Duquesne Law Review

Volume 31 | Number 1 Article 6

1992

The Model Employment Termination Act: Fruitful Seed or Noxious Weed?

Jeanne Duquette Gorr

The Model Employment Termination Act: Fruitful Seed or Noxious Weed?

> You mustn't tell me you've got people to see—I put thirty-four years into this firm . . . and now I can't pay my insurance! You can't eat the orange and throw the peel away—a man is not a piece of fruit!
>
> A. Miller, *Death of a Salesman*, Act II at 82 (1949).

I. Introduction

In August 1991, the National Conference of Commissioners on Uniform State Laws (hereinafter Commissioners) passed the Model Employment Termination Act (hereinafter META).[1] META is intended to reduce the uncertainty for both employers and employees which has resulted from recent judicial incursion into the nineteenth century employment at will doctrine. The Act is, however, the product of a great deal of compromise, necessary because employers, employees, unions, and other interest groups must all be convinced that they will benefit from such a legislative enactment if it is to pass in the state legislatures.

In 1988, Professor Theodore J. St. Antoine was appointed reporter for META by the Commissioners. Just prior to his appointment, he wrote a law review article in which he proposed a legislative solution to the problem of wrongful termination. In this paper, the author will compare META with St. Antoine's original proposal.

Throughout this paper, the protections and remedies available to at-will employees under the common law will be compared with the protections and remedies available under META. Based upon this comparison, the author will assess whether META is, in fact, a good idea from the perspective of the non-unionized "at-will" employee.

---

1. Uniform Law Commissioners' Model Employment Termination Act, IERM 540:21 (1991) ("META"), drafted by the National Conference of Commissioners on Uniform State Laws, approved and recommended for enactment in all the states in August 1991, with prefatory notes and comments. (Document on file with The *Duquesne Law Review*).

A. *The History of At-Will Employment*

In the last half of the nineteenth century, the United States developed a unique rule regarding the employment relationship. Unlike the English rule which presumed a contract for one year when no period of employment was specified, the American rule held that employers, absent a fixed-term contract, could dismiss their employees "for good cause, for no cause or even for cause morally wrong."[2] Employees were likewise free to quit their jobs on the same basis. This rule, known as the at-will employment doctrine, flourished through the late nineteenth and early twentieth century.[3]

After World War II, several developments came together that caused courts to more closely scrutinize the at-will employment doctrine. First, unions negotiated collective bargaining agreements which included provisions for arbitration of grievances and which required employers to bear the burden of proving just cause for discharge or discipline of employees.[4] Indeed, during the heyday of the unions, approximately twenty-eight per cent (28%) of the non-agricultural workforce was covered by collective bargaining agreements, ninety-five per cent (95%) of which had grievance and arbitration provisions.[5]

In addition to collective bargaining provisions, many employees acquired statutory protection from unjust discharge as a result of the civil rights movement of the 1960's. In the 1960's and 1970's, many statutes were enacted which protected employees from discharge because of race, religion, sex, age and national origin.[6] As a result of such enactments, both employees and the courts became increasingly sensitive to issues of fairness and due process.[7] Statutory protection from "adverse action" was also extended to state and federal employees through civil service provisions.[8]

The recognition of employment as a property right protected by the due process clause of the Fourteenth Amendment was another expansion of protection from unjust dismissal for *public* employ-

---

2. META at 3, citing *Payne v Western & A. R.R.*, 81 Tenn 507, 519-20 (1884).

3. META at 3

4. Cornelius Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge*, 66 Wash L Rev 719, 729 (1991) ("Peck").

5. Peck at 729, citation omitted.

6. Id at 728, citation omitted.

7. William B. Gould IV, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 Empl Rel L J 404, 409-10 (1987-88) ("Gould, *Case*").

8. Peck at 729-30.

ees.[9] In fact, one scholar has commented that the starting point for evaluating the issue of wrongful discharge is:

> the realization that in a modern industrialized economy employment is central to one's existence and dignity . . . . Along with marital relations and religion, it is hard to think of what might be viewed as more vital in our society than the opportunity to work and retain one's employment status.[10]

For many public and private employees after World War II, the job replaced home, family, church, neighborhood, and community as the primary source of identity, object of loyalty, and major social unit.[11] (It could even be argued that corporations requiring middle management employees to uproot their families and move every three or four years was one of the major *causes* of the shift in loyalty and identity from the community to the corporation.)

Ironically, as middle management shifted its loyalty to the corporation, such loyalty was rewarded with the rash of corporate mergers and takeovers of the 1980's, which resulted in the displacement of thousands of middle-level management personnel and subsequent lawsuits.[12] These cases were very difficult for both judges and juries because of the subjective nature of the work done by such employees.[13] The cases were no doubt also very difficult because of the injustice done to these employees.

B. *The History of Judicial Activism and the At-Will Employment Doctrine*

It is estimated that as a result of the aforementioned statutory and union protections afforded employees against unjust dismissal, approximately thirty-five (35%) to forty per cent (40%) of all non-agricultural employees had "substantial specific" protection against unjust dismissal by the end of the 1970's.[14] Moreover, this figure does not include the classes of employees protected by Title VII and the Age Discrimination in Employment Act, under both of which discharge of a protected employee is highly suspect.[15] Subse-

---

9. Id at 727-28.

10. William B. Gould IV, *Job Security in the United States: Some Reflections on Unfair Dismissal and Plant Closure Legislation from a Comparative Perspective*, 67 Neb L Rev 28, 30 (1988), citation omitted ("Gould, *Perspective*").

11. Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 Neb L Rev 178, 181 (1988) ("Tobias").

12. Gould, *Case* at 409-10 (cited in note 7).

13. Id.

14. Peck at 730 (cited in note 4).

15. Id.

quently, since so many employees were protected in one form or another, the courts began to question why "only white males under the age of 40 lacked some kind of job protection . . ."[16] Stated more seriously, the courts began to wonder why, if arbitrariness with regard to race and sex was not tolerated as a basis for dismissal, any arbitrariness should be tolerated with regard to any employee.[17]

In response to the disparity between protection afforded private, at-will employees and the protection afforded public, union and protected classes of employees, the courts began to fashion judicial exceptions to the at-will employment doctrine.[18] These exceptions fall into three broad categories: contract analysis, tort analysis and public policy analysis.[19]

Under contract analysis, some courts have examined the original employment agreement in order to find a contract.[20] Other courts have looked at language in the personnel handbook or policy manual as a basis for finding a contract.[21] Still other courts have held that where the employee confers extra consideration on the employer, for instance in the form of commissions, such consideration creates an implied contract.[22] Finally, some courts have relied upon an implied covenant of good faith and fair dealing, especially where employees are on the eve of receiving accrued benefits in the form of a pension or commission from sales.[23] For example, in the early 1980's the Montana Supreme Court began recognizing the implied covenant of good faith and fair dealing, under which huge awards were granted to employees.[24]

---

16. Id at 732.

17. Id.

18. By 1974, the Supreme Court of New Hampshire articulated the growing concern for fairness when it balanced an employer's interest in running his business as he saw fit against the employee's interest in maintaining his employment, and the public's interest in finding a proper balance between the two competing interests. Peck at 732-33, citing *Monge v Beebe Rubber Co.*, 114 NH 130, 316 A2d 549 (1974).

19. Comment, *Reforming At-Will Employment Law: A Model Statute*, 16 U Mich J L Ref 389, 394-401 (1983) ("*Model*").

20. *Model* at 396-97.

21. Id.

22. Id.

23. Id.

24. This may well be one of the reasons Montana employers, "seek[ing] both relief and certainty," endorsed enactment of the first state statute covering wrongful discharge. Peck at 752 (cited in note 4) (citing Mont Code Ann § 39-2-903(1) (1987)). See also *Crenshaw v Bozeman Deaconess Hospital*, 213 Mont 488, 693 P2d 487 (Mont 1984); *Gates v Life of Montana Ins. Co.*, 196 Mont 178, 638 P2d 1063 (Mont 1982); and *Dare v Montana Petroleum Mktg. Co.*, 212 Mont 274, 687 P2d 1015 (Mont 1984).

In addition to contract analysis, the courts have used tort analysis to afford relief to wrongfully discharged at-will employees. Theories the courts have used to grant relief to employees include retaliatory discharge, where an employee has been discharged after blowing the whistle on employer wrongdoing,[25] and intentional infliction of emotional harm. For an employee to recover under the intentional infliction of emotional harm analysis, however, (s)he must show outrageous behavior on the part of the employer.[26]

Finally, the courts have resorted to public policy analysis in order to afford wrongfully discharged employees some relief. This analysis has been used where the employee has opposed unethical activities on the part of the employer, has exercised a statutory right, has refused to take a polygraph test, or has had jury or some other civic duty to perform and has subsequently been terminated.[27] Courts are reluctant to rely too heavily on public policy, however, as this area more than the others seems to be the particular domain of the legislature.[28]

C. *Advantages of Legislation over Adjudication*

Despite the valiant efforts of the courts to provide protection for at-will employees who are unjustly dismissed, judicial relief has inherent shortcomings. First, courts will only hear cases and award damages where there has been either a serious violation of public policy, or a contractual breach; they will not impose an affirmative duty on an employer to prove just cause in order to support a dismissal.[29] In addition, even if an employee can get a day in court, (s)he probably will not be able to afford it. Today, the average cost to the employee to get to trial is around $10,000.[30] Thus, even when the employee is paying an attorney on a contingency fee basis, which is the way these cases are usually handled, the average middle management or service industry non-unionized employee will not be able to litigate his claim.[31] Furthermore, since the attorney's fee is often contingent on recovery, and recovery is based upon the employee's losses as determined by salary during employ-

---

25. *Model* at 399-401 (cited in note 19).
26. Id.
27. Id at 398-99.
28. Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 Neb L Rev 56, 60 (1988) ("St. Antoine").
29. *St Antoine* at 65.
30. Gould, *Case* at 413 (cited in note 7).
31. Id.

ment, lawyers have a built-in bias towards representing the highly paid employee.[32]

Accordingly, recognizing the inherent shortcomings in judicial solutions, scholars started proposing legislative solutions to the problem of unjust dismissal twenty-five years ago.[33] More recently, legislatures have recognized and begun to address the problem. In 1980, a bill was introduced into the U.S. House of Representatives which would have made unjust dismissal an unfair labor practice under the NLRA; the bill did not, however, reach non-union employees.[34] In addition, forty out of forty-five states and territories responding to a recent academic survey indicated that bills had been introduced in their legislatures in the past ten years concerning "employment termination, at-will employment, or a related subject."[35] While only one of these bills has become law,[36] such interest indicates that the time may be right for legislative intervention.

D. *Advantages of Arbitration over Litigation*

The one characteristic shared by all of the model and proposed statutes discussed herein is reliance on, or preference for, some form of arbitration to hear unjust dismissal claims. One of the virtues of arbitration over litigation is the huge cost savings. In fact, from the employers' perspective, the biggest advantage of a legislated solution to the problem of unjust dismissal is that, by having unjust dismissal claims arbitrated rather than litigated, employers will not be subject to the huge awards juries are likely to levy against them.[37] In a 1987 study of California wrongful discharge cases, plaintiffs won seventy-eight per cent (78%) of the time with average damages of $424,500.[38] Legal fees to defend a wrongful discharge action average around $80,000.[39]

---

32. Id.

33. See, for example, Lawrence E. Blades, *Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 Colum L Rev 1404 (1967); Cornelius J. Peck, *Unjust Discharges From Employment: A Necessary Change in the Law*, 40 Ohio St L J 1 (1979); and Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va L Rev 481 (1976).

34. *Model* at 403 (cited in note 19), citing the Corporate Democracy Act, HR 7010, 96th Cong, 2d Sess (1980).

35. META at 4 (cited in note 1), citing a survey by Professor Stuart Henry.

36. Mont Code Ann § 39-2-903(1) (1987).

37. St. Antoine at 69 (cited in note 28).

38. Id. The highest award reported during this period was $20 million.

39. META at 3 (cited in note 1).

From the employees' perspective, it is estimated that middle or upper-level management employees account for sixty (60) to eighty per cent (80%) of all successful plaintiffs; lower level employees rarely prevail.[40] Part of the reason for these statistics is, no doubt, the cost of litigating a claim for wrongful discharge. Employees can spend up to $40,000 on legal fees in wrongful termination cases, which can take a year or more.[41] In contrast, arbitration takes a few weeks and costs around $15,000 *total* per case.[42] Studies indicate that approximately 200,000 employees a year are unfairly terminated.[43] Of these, one study estimates that 12,000 to 15,000 of the claims would have been arbitrated had such a remedy existed.[44]

Besides the costs of going to court, the discharged employee also faces the delay and formality inherent in court proceedings.[45] With courts backlogged for a year or more, an employee can ill afford to wait for a day in court to find out if (s)he will be reinstated.[46] In addition, because of the adversarial nature of judicial proceedings, it is hard to reestablish a good working relationship in the event reinstatement is ordered.[47] Finally, in court an employee must prove an unjust dismissal with limited access to records and information.[48] Conversely, with most arbitration proceedings under collective bargaining agreements, the burden is on the employer to prove just cause for dismissal.[49] Thus the employee would be entitled to warnings before discharge unless behavior were egregious and would get a chance to confront an accuser at a hearing, thereby obtaining a measure of due process.[50]

The employer is also disadvantaged by court proceedings, facing as it does the inconsistency and unpredictability of judicial remedies from state to state, depending on the wrongful discharge theory a particular state court adopts.[51] For this reason, uniform arbi-

---

40. Id.
41. *Why States Should Adopt the Model Employment Termination Act*, National Conference of Commissioners on Uniform State Laws Publicity Statement, 2 (1991) (on file with The *Duquesne Law Review*).
42. Id.
43. Peck at 730 (cited in note 4) (citations omitted).
44. Id at 731 (citations omitted).
45. *Model* at 390 (cited in note 19).
46. Id at 402.
47. Id.
48. Id at 401-02.
49. St. Antoine at 65 (cited in note 28).
50. Gould, *Case* at 416 (cited in note 7).
51. *Model* at 401 (cited in note 19).

tration would provide a much more consistent playing field for employers who do business in more than one state.[52] In addition, arbitrators are less likely than juries to be sympathetic to employees' claims that they were dismissed for refusing to follow an order they found morally reprehensible unless such employees have first exhausted in-house avenues of redress.[53] Nor would arbitrators be as likely as juries to reverse layoffs based upon strictly economic factors because they sympathized with the employee.[54]

II. Legislative Solutions: Professor St. Antoine's Model Compared with META

Since the mid-1960's, scholars have been advocating a legislative solution to the at-will dismissal problem. Various models have been proposed, including a proposal advocated in a Comment in the University of Michigan Journal of Law Reform in 1983[55] and another proposal by Professor St. Antoine, who teaches at the University of Michigan, in 1988.[56] Since Professor St. Antoine became the Reporter for META shortly after he wrote his article proposing an unjust dismissal statute, it is instructive to compare the St. Antoine model with META in order to determine how Professor St. Antoine's theory has yielded to the practicality of the Model Act.

A. *Substantive Provisions*

1. The Just Cause Standard

In his proposal, Professor St. Antoine first acknowledged that a federal statute would be the ideal solution, but recognized that such a statute was unlikely.[57] He therefore opted for state statutes which have the advantage of allowing for experimentation with different models.[58] St. Antoine then discussed the issues any proposal would have to confront. First, he recommended adoption of the "just cause" standard without any further elaboration, arguing that increased specificity could only lead to underinclusiveness and that those who must hear just cause claims would have the entire

52. Thomas H. Barnard and Martin S. List, *Defense Perspective on Individual Employment Rights*, 67 Neb L Rev 193, 210 (1988) ("Barnard").

53. Gould, *Case* at 415-16 (cited in note 7.)

54. Id.

55. *Model*, at 394-401 (cited in note 19).

56. St. Antoine, at 56 (cited in note 28).

57. Id at 71.

58. Id.

body of arbitral precedent at their disposal.[59] St. Antoine then advocated that the statute remain "discreetly silent" on the burden and quantum of proof required to prove unjust dismissal.[60]

META does in fact follow St. Antoine's proposal and adopt the good cause standard for dismissals, specifying that unless the employer and employee enter into a severance pay agreement or agree to employment for a specified duration as provided under Sections 4(c) and 4(d) of the statute, "an employer may not terminate the employment of an employee without good cause."[61] Ignoring St. Antoine's advice, however, the statute not only attempts to define "good cause,"[62] but gives examples in the Comments to Section 1(4).[63] Good cause is defined in the Comment section as:

> (i) a reasonable basis related to an individual employee for termination of the employee's employment in view of relevant factors and circumstances, which may include the employee's duties, responsibilities, conduct on the job or otherwise, job performance, and employment record, or (ii) the exercise of business judgment in good faith by the employer, including setting its economic or institutional goals and determining methods to achieve those goals, organizing and reorganizing operations, discontinuing, consolidating, or divesting operations or positions or parts of operations or positions, determining the size of its work force and the nature of the positions filled by its work force, and determining and changing standards of performance for positions.[64]

It is clear from the language of the statute that employees laid off due to mergers and acquisitions or other company restructuring will gain no protection from the statute, since they will be considered to have been discharged for good cause. This is in sharp contrast to the decisions of some arbitrators under collective bargaining agreements, which call dismissals for economic reasons "layoffs," thus avoiding the shadow "inevitably cast . . . on a worker's character and reputation" by the term "discharge."[65]

META's Comment section also reinforces the impression that middle management and other merger and acquisition victims will receive little relief from META. Specifically, the Comment states that the statute is in no way intended to function as a plant closing

---

59. Id.
60. Id at 72.
61. META, § 3(a) at 17 (cited in note 1).
62. Id at § 1(4) at 9-10.
63. Id at Comment, § 1(4) at 11.
64. Id at § 1(4) at 9-10.
65. Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works*, 654 (BNA, 4th ed 1985) ("Elkouri").

law; rather, an employer's decisions about the size and composition of its work force vis a vis its economic goals are subject only to the exercise of honest business judgment.[66] Employers will therefore have a great deal of latitude in determining how to structure their operations, subject only to the constraints of applicable federal, state and local anti-discrimination law.[67]

Employers under META will have another advantage not held by management in union shops: the unilateral ability to change the performance standard for a job and to discharge employees who cannot meet the new standard.[68] The Comment section explains that the performance standard in highly competitive fields, including most professions, could be "the most proficient performer available for a particular position."[69] Such a standard offers little protection to the older worker.

The Comment section also lists non-economic examples of good cause for termination. Included are theft, assault, fighting on the job, destruction of property, use or possession of drugs or alcohol on the job, insubordination, excessive absenteeism or tardiness, incompetence, lack of productivity and inadequate performance or neglect of duty.[70] Off-duty conduct may also be grounds for good cause discharge where, for instance, it is relevant to the employee's job performance or the employer's business reputation.[71]

2. *Burden of Proof*

Besides ignoring Professor St. Antoine's advice not to define good cause, META also ignores his suggestion that the statute remain "discreetly silent" as to the burden of proof[72] and provides that (1) the complainant employee has the burden of proving that a termination was without good cause and (2) the complainant employer has the burden of proving that a termination was with good cause.[73] The employer becomes the complainant only in those cases in which, prior to terminating an employee, the employer files a complaint and demand for arbitration to determine whether there

66. META at Comment, § 1(4) at 12 (cited in note 1).
67. Id at 13.
68. META at § 1(4) at 13 (cited in note 1).
69. Id at Comment, § 1(4) at 13.
70. Id at 12.
71. Id at 12.
72. See note 60 and accompanying text.
73. META, § 6(e) at 28 (cited in note 1).

is good cause for the termination of a named employee.[74] Given this shift in the burden of proof depending upon who files the complaint, it is hard to imagine an employer who would be foolish enough to file a complaint seeking determination of good cause when he could simply discharge the employee, forcing him or her to raise the complaint and thereby shoulder the burden of proof. Regardless of who has the burden of proof, however, the employer is required to present his case first under META unless the employee alleges a constructive discharge.[75] META uses the standard adopted in sex discrimination cases for situations in which the employee makes out a *prima facie* case of wrongful discharge.[76] In such cases, "the employer, to avoid liability, must then establish by a preponderance of the evidence that it would have terminated the employment even in the absence of the impermissible grounds."[77]

The above provisions seem to be a major concession to employers, far removed from the wrongful discharge standard under collective bargaining agreements which force the employer to shoulder the burden of proof.[78] Collective bargaining agreements, regarding discharge as "industrial capital punishment,"[79] usually require that employers prove just cause for discharge.[80] The quantum of proof required to prove just cause has included the entire range known to the legal community, depending upon the severity of the charge against the employee and the resulting repercussions in his or her life.[81] Certainly then, employees would have been much better off if META had followed Professor St. Antoine's recommendation and maintained a "discreet silence" on this subject.[82]

3. Coverage

a. Who is Covered

The most obvious distinction between Professor St. Antoine's

---

74. Id at § 5(c) at 25.

75. Id at § 6(e) at 28, citing § 1(8)(iii).

76. Id at Comment, § 6(f) at 30, citing *Price Waterhouse v Hopkins*, 490 US 228 (1989).

77. META at § 6(f) at 28.

78. Elkouri at 661 (cited in note 65).

79. Id, (citations omitted).

80. Id.

81. Id at 662. Quanta of proof required have included: "sufficient to convince a reasonable mind of guilt," "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt." Id.

82. See note 60 and accompanying text.

proposal and META is META's provision that the employer and employee may enter into an express written agreement by which the employee either agrees to additional justifications for good cause termination or waives the right to a good cause determination altogether.[83] Under Section 4(b), the employer and employee may provide that:

> the employee's failure to meet specified business-related standards of performance or the employee's commission or omission of specified business-related acts will constitute good cause for termination . . .[84]

The Comment section explains that this provision affords the employer and employee "great flexibility" in agreeing upon performance standards as long as there is no "duress or overreaching by *either* party."[85] One must wonder what the Commissioners had in mind when they expressed concern that the *employee* might overreach on this issue. One may also wonder what the *quid pro quo* is for the employee who waives his rights.

Under Section 4(c) of META, by comparison, the employee is at least provided with a *quid pro quo* for waiving his or her rights to the requirement of good cause for termination. This section provides that the statutory good cause right may be waived if the employer and employee mutually agree that:

> upon the termination of the employee for any reason other than willful misconduct . . . the employer will provide severance pay in an amount equal to at least one month's pay for each period of employment totaling one year, up to a maximum total payment equal to 30 months' pay at the employee's rate of pay . . .[86]

In essence, Section 4(c) allows the employer to purchase the right to terminate the employee at will.[87] The Comment section explains that this provision would most likely be used in agreements with management personnel and key professionals.[88] Presumably such employees are in a better bargaining position than lower level white collar employees such as bank tellers, computer programmers and secretaries. Nonetheless, since employees under the Act may be entitled to a lump-sum severance payment equal to 36 months' pay if the case is arbitrated,[89] it is curious that, by waiving

---

83. META at § 4(b) & (c) at 19-20 (cited in note 1).
84. Id at § 4(b) at 19.
85. Id at Comment, § 4(b) at 23 (emphasis added).
86. Id at § 4(c) at 20.
87. Id at Comment, § 4(c) at 23.
88. Id at 23.
89. Id at § 7(b)(3) at 30-31.

their rights under the Act and saving the employer the time and cost of arbitration, they agree to a smaller, rather than a larger, payment.

By contrast, Professor St. Antoine's approach to allowing employers and upper-level managers the "flexibility" of at-will employment was simply to exclude them from coverage under a wrongful termination statute.[90] He argued that middle, but not upper-level, managers should be covered and that probationary employees should not be protected.[91] (It is not clear exactly where St. Antoine would draw the line between middle and upper-level management.) Professor St. Antoine further argued that public employees, who already have constitutional due process and/or civil service protection should also be exempted from coverage under the Act.[92] When it came to union employees, however, St. Antoine was less emphatic. On the one hand, he acknowledged the preemption problem created by union employees' protection under federal statutes such as National Labor Relations Act (NLRA) and Railway Labor Act (RLA).[93] On the other hand, however, St. Antoine saw no "principled grounds" for treating union employees differently from the nonunionized and argued that it is inherently unfair for union employees to have to spend a bargaining chip in order to obtain the same safeguards non-unionized employees obtain gratis.[94] After discussing recommendations by various other scholars in the field, St. Antoine recommended that union employees be covered, giving priority to the collective bargaining contract and the duty of fair representation, after which the statutory protection would be available.[95] Still, St. Antoine acknowledged the practicality of excluding union employees.[96]

META, closely paralleling St. Antoine's model in this area, extends coverage to unionized employees, providing that no rights of employees against employers arising under state or federal statutes or administrative rules and regulations having the force of law, or under collective bargaining agreements, are displaced or extinguished by the Act.[97] The Comment to the Act acknowledges the

---

90. St. Antoine at 72-73 (cited in note 56).
91. Id.
92. Id at 73.
93. Id at 74.
94. Id at 75.
95. Id at 75-76.
96. Id at 76.
97. META at § 2(e) at 14-15 (cited in note 1).

preemption problem by providing that unionized employees subject to federal law are entitled to exercise their rights under the Act to the extent allowed by the developing law of preemption.[98] The Act leaves to the individual states, however, the decision whether META should apply to the state's employees or employees of its political subdivisions.[99] The Comment explains that uniformity is less important with regard to public employees since (1) they are not employed by multi-state employers, and (2) they usually have protection through civil service.[100]

In return for protection under the Act, terminated employees relinquish all common-law rights and claims against their employer and its agents which are based on the termination.[101] The Comment section explains that the rights and claims that are lost are primarily tort actions of defamation, intentional infliction of emotional distress "and the like."[102] Noting that there may be "independent" tort actions for assault, malicious prosecution, false imprisonment, etc., the Comment then explains that whether the tort action is abolished depends upon "whether its basis is the termination itself or acts taken or statements made that are reasonably necessary to initiate or effect the termination."[103] Interpretation of this language should provide lawyers with years of steady employment. In addition, according to the Comment section, employees also relinquish contract actions based on implied-in-fact employment agreements in exchange for protection under the Act.[104] Interestingly, nothing is said about abolishing actions based upon the covenant of good faith and fair dealing, one of the biggest financial bonanzas to terminated employees.[105] Since the Comment only mentions contract actions based upon implied employment agreements and does not include an *ejusdem generis* provision as it does with tort actions,[106] perhaps plaintiff's attorneys will be mollified into supporting the Act based upon this possible loophole.

While META covers both union and some public employees, it

---

98. Id at Comment, § 2(d), (e) at 16, citing *Lingle v Norge Div. of Magic Chef, Inc.*, 486 US 399, 108 SCt 1877 (1988).

99. META at § 1(2) at 9 (cited in note 1).

100. Id at Comment, § 1(2) at 11.

101. Id at § 2(c) at 14.

102. Id at Comment, § 2(c) at 15.

103. Id.

104. Id at 15-16.

105. See notes 23-24 and accompanying text.

106. See notes 102-103 and accompanying text.

expressly does not cover: (1) independent contractors;[107] (2) employees who enter into express or implied contracts of employment for a specified duration;[108] or (3) probationary, temporary or part-time employees.[109] A probationary employee is defined in the Act as one who has worked for the employer for less than one year.[110] Seasonal workers can, however, be covered by the Act since temporary breaks in service of one year or less do not necessarily destroy prior employment status.[111] Part-time work is defined as less than 520 hours during the twenty-six (26) weeks immediately preceding termination;[112] therefore, employees who work twenty or more hours per week on the average are covered by the Act.[113] This is good news for many part-time workers. Moreover, while Professor St. Antoine would exclude from coverage those employees working for employers employing fewer than ten or fifteen employees,[114] META includes employees working for employers employing *five* or more employees, excluding immediate family members.[115]

b. What is covered

Another major difference between Professor St. Antoine's recommendation and the Model Act concerns the kinds of discipline covered. Professor St. Antoine recommended that other forms of discipline, such as extended suspension, demotion, denied promotion and onerous job assignments be included in a wrongful termination statute.[116] Citing the European experience, St. Antoine argued that with such protection, it is harder for employers to hide the unfair treatment of employees behind economic downturns.[117] In addition, St. Antoine suggested that a wrongful termination statute follow the example of the Montana wrongful discharge statute,[118] which explicitly covers constructive discharge. Constructive discharge is defined in the Montana statute as:

'voluntary termination of employment by an employee because of a situa-

---

107. META at §1(1) at 9 (cited in note 1).
108. Id at § 2(b) at 14.
109. Id at § 3(b) at 17-18.
110. Id at Comment, § 3(b) at 18.
111. Id at 18-19.
112. Id at § 3(b) at 17-18.
113. Id at Comment, § 3(b) at 8.
114. St. Antoine at 73 (cited in note 56).
115. META at § 1(2) at 9 (cited in note 1).
116. St. Antoine at 76 (cited in note 56).
117. Id at 76-77.
118. See footnote 24 and accompanying text.

> tion created by an act or omission of the employer . . . so intolerable that voluntary termination is the only reasonable alternative."[119]

While META declines St. Antoine's invitation to extend just cause protection to forms of discipline other than discharge, META does include constructive discharge within its definition of "termination," using language remarkably similar to that used in the Montana statute, quoted above:

> . . . a quitting of employment or a retirement by an employee induced by an act or omission of the employer, after notice to the employer of the act or omission without appropriate relief by the employer, so intolerable that under the circumstances a reasonable individual would quit or retire.[120]

There are two readily apparent differences between the Montana statute's constructive discharge language recommended by St. Antoine and META's constructive discharge provision. The first is the inclusion in META of a requirement that the employee notify the employer of an act or omission compelling voluntary termination.[121] Such a requirement seems reasonable, as it allows the employer an opportunity to remedy an unacceptable situation before losing a valuable employee. Moreover, it should not be unduly burdensome to the employee. The second difference between META and the Montana statute on the issue of constructive discharge is that META does not require that quitting be the *only* reasonable alternative available to the employee; rather, META merely requires the employee to prove that under the circumstances, a *reasonable* individual would quit or retire. Proving reasonableness is a much lighter burden than proving no choice. META is therefore more favorable to the employee than the Montana statute recommended by St. Antoine on this point.

B. *Procedural Provisions*

1. Arbitration

In addition to the substantive similarities and differences between META and Professor St. Antoine's proposed act, there are also procedural similarities and differences. The most important procedural aspect of both plans is that they recommend arbitration as the preferred route to settling disputes in just cause termination cases. Professor St. Antoine acknowledged that hearing officers and

---

119. St. Antoine at 76, citing Mont. Code Ann. § 39-2-903(1) (1987).
120. META at § 1(8)(iii) at 11 (cited in note 1).
121. Id.

agencies could be given responsibility for settling such disputes, but argued that the arbitration model has been proven superior for just cause determinations.[122] Among the advantages of arbitration, St. Antoine cited the vast body of precedent, both procedurally and substantively, available regarding just cause claims.[123] In addition, he noted that there is an established nucleus of experienced arbitrators who can train those less experienced,[124] and explained that this core of experienced arbitrators allows for flexibility since the state would not have to hire a large permanent staff at the outset until the caseload could be determined.[125] He further suggested that the state could use a mix of staff and free-lance arbitrators, thereby allowing it to keep permanent staff to a minimum.[126] Lastly, St. Antoine argued that arbitration works well in the just cause setting as opposed, for example, to the social security setting, because there is not the need for detailed expertise in just cause claims that there is with social security and some other agency claims.[127]

META, like Professor St. Antoine, adopts the arbitration model as its preferred enforcement procedure. META, however, also provides in an appendix two alternative means of enforcing the Act.[128] The first alternative allows a state to assign enforcement of the Act to a new or existing administrative agency.[129] The second alternative would leave enforcement to the civil courts.[130] While a case can probably be made for administrative agency enforcement of META, it is hard to imagine what benefits accrue to employees by keeping enforcement in the courts when a primary criticism of the existing situation is that the courts are too costly, too formal and too slow.[131] Thus, by utilizing the second alternative, the state does little more than hand back to its employees all of the disadvantages of going to court, stripped of the incentive of a potential large jury award.[132]

Comparing the arbitration models proposed by St. Antoine and

---

122. St. Antoine at 77 (cited in note 56).
123. Id.
124. Id.
125. Id.
126. Id at 77-78.
127. Id.
128. META at Appendix at 39 (cited in note 1).
129. Id at Appendix, Alternative A at 39-40.
130. Id at Appendix, Alternative B at 41-44.
131. See notes 29-50 and accompanying text.
132. See notes 37-38 and accompanying text.

META reveals that both St. Antoine and META leave it to the discretion of each state to decide whether an existing or new agency should enforce the termination statute.[133] St. Antoine's proposal offered existing administrative agencies, civil rights commissions or state labor departments as possible alternatives.[134] META lists state labor departments, labor relations commissions, mediation services or unemployment compensation bureaus as possibilities, but also suggests that day-to-day operations might be delegated to an outside private agency such as the American Arbitration Association.[135]

On the issue of pre-arbitration proceedings, St. Antoine followed Michigan and California proposals providing a stage prior to arbitration during which claims that could be settled before reaching arbitration are screened out and referred to mediation.[136] (In an administrative agency setting, St. Antoine advocated the use of a "reasonable cause" determination by an agency official at the pre-hearing stage.)[137]

META, in contrast, provides for no such pre-arbitration evaluation. Instead, the employee may file a complaint and demand for arbitration within 180 days of termination unless (s)he is pursuing internal remedies within the company, in which case the time for filing is temporarily suspended.[138] Employees are not, however, required by the Act to pursue such internal remedies.[139] The only pre-arbitration procedure provided by META is optional discovery, allowable at the discretion of the arbitrator.[140] Minimally, the employee is entitled to a complete copy of his or her personnel file.[141] Under META, employers may also file a complaint and demand for arbitration to determine whether they have good cause for terminating an employee.[142] Since the burden of proof shifts to the party who files, however, it seems unlikely, as discussed earlier, that employers will have much incentive to use this feature of

---

133. St. Antoine at 77 (cited in note 56); META at Comment, § 6(a) (cited in note 1).

134. St. Antoine at 77 (cited in note 56).

135. META at Comment, § 6(a) at 28-29 (cited in note 1).

136. St. Antoine at 78 (cited in note 56).

137. Id.

138. META at §5(a) at 24-25 (cited in note 1).

139. Id at 25.

140. Id at § 6(c) at 27-28.

141. Id.

142. Id at §5(c) at 25.

META.[143] Both META and St. Antoine require a nominal filing fee in order to discourage frivolous claims. St. Antoine recommended that the fee be approximately $100.[144] META leaves the amount open, but requires that it not exceed the maximum filing fee for a civil suit.[145]

2. *Remedies and Damages*

Assuming the employee prevails on the claim of unjust discharge, St. Antoine recommended that the arbitrator decide upon the appropriate remedy.[146] Among the options available to the arbitrator, St. Antoine suggested reinstatement with or without back pay, or, where reinstatement is not appropriate, some form of severance pay which includes payment for benefits lost.[147] He then reviewed provisions various states have considered. California's proposed statute allowed two years' pay with interest and benefits where reinstatement was not appropriate, with attorneys' fees and costs to the prevailing party.[148] The Michigan bill provided for a severance payment but no attorneys' fees.[149] The Montana provision, the only one ultimately adopted, permits no common law actions but allows punitive damages where the employee proves actual fraud or malice.[150] The Montana statute also provides four years of lost wages and benefits; reinstatement is not mentioned.[151] Notably, St. Antoine expressed concern that without union support, reinstatement may prove to be very difficult as the returning employee may face a hostile work environment alone.[152] Interestingly, this is the attitude of most European countries, where reinstatement is rarely an option and, even where it is an option, it is rarely exercised.[153]

Conversely, META adopts reinstatement as the preferred remedy for terminations under the Act, recommending reinstatement

---

143. See notes 73-77 and accompanying text.
144. St. Antoine at 80 (cited in note 56).
145. META at § 5(e) at 26 (cited in note 1).
146. St. Antoine at 79 (cited in note 56).
147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. Id.
153. Gould, *Perspective* at 51 (cited in note 10). See also Herbert L. Sherman Jr., *Reinstatement as a Remedy for Unfair Dismissal in Common Market Countries*, 29 Am J Comp L 467 (1981) and Samuel Estreicher, *Unjust Dismissal Laws: Some Cautionary Notes*, 33 Am J Comp L 310, 319 & 322 (1985).

either to the employee's prior job or to a comparable position.[154] As for the issue of retaliation by the employer against the reinstated employee or any other party lawfully participating in the wrongful discharge proceedings, the problem is addressed in META by the provision that an employer who directly or indirectly retaliates can be held liable for damages, including punitive damages, and attorney fees.[155] The wronged employee is entitled to bring a separate civil action to enforce this liability.[156]

As St. Antoine suggested, however, the arbitrator may choose remedies other than reinstatement under META. One option the arbitrator may choose under META is full or partial backpay with interest plus reimbursement for lost fringe benefits, with the employee required to exercise due diligence to mitigate damages.[157] Another option is a lump-sum severance payment at the employee's rate of pay for a period not exceeding thirty-six (36) months, plus the value of fringe benefits lost, less likely earnings and benefits from employment elsewhere.[158] Employees are also entitled under META to reasonable attorney's fees and costs.[159] Moreover, where an arbitrator finds that an employee has been terminated without good cause, but none of the aforementioned remedies is appropriate, the arbitrator is permitted to issue an "award in the nature of a 'declaratory judgment' to vindicate the rights of the employee."[160]

Furthermore, under META, if the arbitrator sustains an *employer's* complaint, the employer gets a finding that there was good cause for terminating an employee.[161] Conversely, if the arbitrator dismisses the employer's complaint, the employee may be awarded reasonable attorney's fees and costs.[162] In addition, if the arbitrator finds that an employee's complaint was "frivolous, unreasonable, or without foundation," the arbitrator may dismiss the complaint and award attorney's fees and costs to the prevailing employer.[163] Finally, arbitrators may only make awards as provided by the statute; they may not award damages for "pain and suffering, emo-

154. META, § 7(b)(1) at 30 and Comment, § 7(b)(3) at 33 (cited in note 1).
155. Id at § 10 at 37.
156. Id.
157. Id at § 7(b)(2) at 30 and Comment at 32-33.
158. Id at §7(b)(3) at 30-31.
159. Id at § 7(b)(4) at 31.
160. Id at Comment, § 7(b) at 32.
161. Id at §7(f) at 32.
162. Id.
163. Id at § 7(e) at 32.

tional distress, defamation, fraud, or other injury under the common law; punitive damages; compensatory damages; or any other monetary award."[164] The implications of this section are discussed *supra*.[165]

In many ways, the provisions of META concerning remedies and damages parallel fairly closely the various provisions found in wrongful termination bills proposed over the years in various state legislatures.[166] One exception, however, is the META provision that employees mitigate damages by seeking employment after a termination and by seeking health and disability insurance coverage.[167] This provision seems highly impractical for two reasons. First, if the employee is unemployed, (s)he will be in no position to pay for insurance. Second, if the employee wants to be reinstated, (s)he will not be able to make an honest commitment to another employer for any length of time. This is particularly true for management-level employees, where the expectation is that someone who is hired plans to stay, and where training for the job can take months or even years. While employees are generally required to mitigate damages under collective bargaining agreements,[168] an allowance should be made under META for the fact that mitigating damages will be much more difficult for employees whose skills are not easily transferable to a different workplace for a short period of time.

Another troublesome provision of the Act in the area of remedies and damages is the requirement that a lump sum severance payment to an employee be reduced by the "likely earnings and benefits from employment elsewhere . . . . taking into account such equitable considerations as the employee's length of service . . . and the reasons for the termination . . ."[169] The Comments refer to this provision as the concept of *proportionality*, under which the employer's liability is determined based on an assessment of the employee's likely loss together with the employer's responsibility for that loss.[170] It does not make sense, however, that an employer who has wrongfully discharged an employee under the limited terms of wrongful discharge covered by this statute should then be

164. Id at § 7(d) at 31-32.
165. See notes 101-106 and accompanying text.
166. See notes 148-51 and accompanying text.
167. See note 157 and accompanying text.
168. Elkouri at 357-60 (cited in note 65).
169. META at § 7(b)(3) at 30-31 (cited in note 1).
170. Id at Comment, § 7(b)(3) at 33.

able to reduce the judgment against him by having the arbitrator estimate what the employee might be able to earn elsewhere in the future. In contract law, one cannot be awarded damages that are speculative, contingent or remote. Here, the employer's damages are reduced on the basis of speculation, contingency and remoteness. Not only is there no practical way to calculate such an adjustment to damages, but the concept is theoretically unsound. If an employer is guilty of wrongfully discharging an employee, (s)he should be forced to pay for the wrongdoing, regardless of the likelihood that the worker might gain employment elsewhere.

3. Judicial Review and Enforcement

Once the arbitrator has made a determination, there is always the possibility that either the employer or employee will wish to appeal. Professor St. Antoine's recommendation was that arbitration be final and binding; however he recognized that a particular state constitution may require a review of the arbitral award.[171] Where such is the case, St. Antoine suggested that the standard of review be fairly deferential, requiring only that the arbitrator's award be "supported by competent, material, and substantial evidence on the record considered as a whole."[172] Since this standard requires a record of the arbitration hearing, Prof. St. Antoine recommended that a tape recorder be used in order to control costs.[173] This is, in fact, the approach proposed in the Michigan wrongful termination bill.[174]

On the issue of review, META presumes that both parties will be entitled to judicial review of the arbitration decision. META therefore provides that either party may apply for vacation or modification of the arbitration award in whatever court is appropriate within ninety (90) days, or for enforcement of the award at any time.[175] As to the standard of review, the Act adopts an even more deferential standard of review than St. Antoine proposed, allowing for vacation or modification of an award only where: (1) the court finds that an award was procured by corruption, fraud or other improper means; (2) there was evidence of partiality or misconduct by the arbitrator; (3) the arbitrator exceeded his or her powers; (4)

171. St. Antoine at 78 (cited in note 56).
172. Id.
173. Id.
174. Id.
175. META at § 8(a) & (b) at 34 (cited in note 1).

the arbitrator committed a prejudicial error of law; or (5) there is some other ground specified by the particular state under a its own arbitration statute.[176]

The Comment section to the Act further notes that while judicial review of arbitration awards under collective bargaining agreements has been sharply limited by the Supreme Court, the basis for the Supreme Court's position has been that collective bargaining agreements are contracts voluntarily agreed upon by both parties.[177] In contrast, the Comment section notes that where individual statutory rights have been the issue, the Court has not been as deferential to arbitration awards.[178] Since META creates an individual statutory right, the Comment indicates that the Supreme Court would most likely follow the latter approach.[179] The Comment seems to advocate, however, that courts employ as deferential a standard of review as is constitutionally permissible, presumably in the interest of finality with its concomitant money and time savings. There would seem to be little need under the proposed standard for a review of the facts of a case; however, a record of the arbitral hearing might still be necessary in order to determine arbitrator partiality or conduct prejudicing the rights of one of the parties. Notably, the statute does not make provision for such a record.

4. Costs

Finally, both Professor St. Antoine and META address the issue of costs. Under collective bargaining agreements, the costs of arbitration are usually split 50-50 between the union and the employer.[180] St. Antoine recognized, however, that this could pose a problem for an individual bringing a complaint since fifteen years ago a typical one day hearing cost the *union* $2,200.[181] At such a rate, recently terminated lower-level white collar employees with no income would be in no position to bear such costs. St. Antoine next reviewed suggestions from various scholars, and proposals in various state bills. Among the alternatives he noted were: having

176. Id at § 8(c)(1)-(5) at 35.

177. Id at Comment, § 8(c)(4) at 36, citing *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 US 593 (1960); and *Paperworkers v. Misco, Inc.*, 484 US 29 (1987).

178. META at Comment, § 8(c)(4) at 36, citing *Alexander v Gardner-Denver Co.*, 415 US 36 (1974); *Barrentine v Arkansas-Best Freight Sys.*, 450 US 728 (1981).

179. META at Comment § 8(c)(4) at 36.

180. St. Antoine at 80 (cited in note 56).

181. Id.

the state pay, just as it does for courts and judges (Summers); requiring both parties to share the costs equally (California and Michigan); or allowing the employee to recoup the costs of arbitration from the employer if the employee prevailed (Montana).[182] Since under St. Antoine's plan, the state would set the rate of pay for arbitrators (since it would be paying the bill), St. Antoine recognized a potential problem. He realized that experienced arbitrators might be unwilling to handle state-paid claims, where the rate of pay would be substantially less than the rate normally received.[183] He therefore suggested that the statute leave open the issue of amount, allowing the parties to determine the quality of arbitration they want.[184] Such a suggestion presumes that there are "state arbitrators" available who are not as qualified as the freelance experienced arbitrators.

Once again, META follows the Montana approach, allowing employees to recoup the costs of arbitration plus reasonable attorney's fees in cases where they prevail.[185] Only where an employee's claim is frivolous are attorney's fees and costs awarded to the employer.[186] The statute leaves open, however, the question of attorney's fees and costs where the employee's claim is not frivolous or unreasonable, but where the employee nonetheless does not prevail on the merits. Presumably the defeated, unemployed employee must absorb such costs. The Comment section acknowledges that in principle, the state should finance the enforcement of a public right.[187] Nevertheless, the Commissioners recognize that tight state budgets may force states to require the parties to absorb some or all of the costs.[188] The Comments therefore suggest that perhaps a cap should be placed on the employee's liability, limited to one or two weeks' pre-termination pay, or that a special tax be imposed on employers to cover the cost of enforcing the statute.[189] Since there is little likelihood that such a tax would pass, employers and employees are back to sharing costs. This means that the arbitrator may have a very hard time collecting his or her fee. It also means that if the employee wants to be represented by an attor-

182. Id (citations omitted).
183. Id at 81.
184. Id.
185. META at §§ 7(b)(4) at 31 and 7(f) at 32 (cited in note 1).
186. Id at § 7(e) at 32 (see note 163 and accompanying text).
187. Id at Comment, § 5(e) at 26.
188. Id.
189. Id at 26-27.

ney, (s)he must try to find one who will work on a contingency fee basis where the most the employee can hope to win is back pay or a lump sum severance amount, eroded by mitigation. This comes pretty close to *pro bono* work for the attorney.

The Comment section further acknowledges that attorney fees are an issue, stating that META's language in this section "deliberately tracks" the language of Title VII of the 1964 Civil Rights Act, and of Supreme Court decisions interpreting Title VII.[190] In determining reasonable attorney fees, the Supreme Court has recognized that, where a small monetary award is being pursued, attorney fees may justifiably be greater than the amount of the award.[191] What the Comments do *not* recognize is that Title VII was an addition to employee rights, for which they gave up nothing. META, on the other hand, requires employees to relinquish their common law rights in exchange for statutory protection. Furthermore, Title VII allows the Equal Employment Opportunity Commission to bring a civil action against an employer if the employer refuses to agree to a conciliation agreement.[192] No such agency support is available to the wrongfully discharged employee under META. In addition, the 1991 amendment to the 1964 Civil Rights Act allows employees to recover compensatory and punitive damages where intentional discrimination is proved.[193] Under META, employees expressly waive their rights to compensatory and punitive damages, regardless of the egregiousness of the discharge.[194] Thus it appears as if, in addition to relinquishing their common law rights, employees under META are required constructively to relinquish their right to be represented by an attorney.

III. Conclusion

It is clear that the nineteenth century doctrine of at-will employment is languishing. When it finally withers and dies, few, except for the law and economics scholars, will miss it.[195] Nevertheless,

---

190. Id at Comment, §§ 7(b)(4), 7(c)(2), 7(e), and 7(f) at 34, citing *Albemarle Paper Co. v Moody*, 422 US 405 (1975); *Christiansburg Garment Co. v EEOC*, 434 US 412 (1978).

191. META at Comment, §§ 7(b)(4), 7(c)(2), 7(e) and 7(f) at 34, citing *City of Riverside v Rivera*, 477 US 561 (1986); *Blum v Stenson*, 465 US 886 (1984).

192. 42 USCA 2000e-5(f), as amended by 102 PL 166 (1991) S 1745, 105 Stat 1071 (The Lawyers Co-operative Publishing Co).

193. 102 PL 166 § 102 (1991).

194. META at §7(d) at 31-32 (cited in note 1).

195. St. Antoine at 66 (cited in note 56) citing Richard Epstein, *In Defense of the Contract at Will*, 51 U Chi L Rev 947 (1984).

both employers and employees are justifiably concerned that what takes the place of the doctrine is, in fact, an improved strain of employment law and not a vexatious weed.

Employers are concerned that they will be asked to absorb the cost of society's applying its "general values of fairness" to the workplace, thus making employers "guarantors of rights generally thought to be afforded solely by governments."[196] Employers therefore are asking that those proposing changes in termination law take into account the costs of "reshaping the workplace," because these costs will be passed along to society through higher prices.[197] Employers are also concerned about the dilemma in which they currently find themselves in certain areas of the law, especially drug or AIDS testing. For instance, employers are concerned about liability for damages caused by employees; however, they are also concerned about liability to employees for wrongfully discharging them if they test positive for drug use or AIDS and for invasions of privacy for requiring that employees be tested.[198] Some employers are therefore requesting national legislation so that they do not have to keep abreast of fifty conflicting sets of rules.

META addresses some of the employers' concerns, providing as it does that use or possession of drugs or alcohol on the job qualifies as good cause for dismissal and that such conduct off-duty can be grounds for dismissal where it is relevant to the employee's job performance or the employer's reputation.[199] META does not, however, address AIDS. In addition, since META is a *model* act rather than a *uniform* act,[200] it still leaves room for states to adopt substantially differing standards for just cause termination. As a result, employers could continue to face the problem of dealing

---

196. Barnard at 209 (cited in note 52).

197. Id.

198. Id at 205-207.

199. META at Comment, § 1(4) at 12 (cited in note 1).

200. "An act shall be designated a 'Uniform Law Commissioner's Model' (or 'ULC Model') Act if

(i) 'uniformity' may be a desirable objective, although not a principal objective;

(ii) the act may promote uniformity and minimize diversity, even though a significant number of jurisdictions may not adopt the act in its entirety; or

(iii) the purposes of the act can be substantially achieved, even though it is not adopted in its entirety by every state."

META at 7, citing the "Statement of Policy Establishing Criteria and Procedures for Designation and Consideration of Acts" adopted by the National Conference of Commissioners on Uniform State Laws on August 2, 1988. In the instant case, the Employment Termination Act was defeated by the Conference as a uniform act, which would have required that states adopt it as it was drafted by the Commissioners.

with widely varying standards of just cause termination from state to state.

The employees' attorneys are equally concerned about the effects of a legislative solution on the problem of wrongful termination. Aside from their obvious self-interest in handsome contingency fees resulting from huge jury awards, plaintiff's attorneys in wrongful termination cases have some legitimate concerns for their clients. Employees are, in fact, giving up a common law right in exchange for statutory protection. Therefore, they must be certain that they maximize the bargaining potential of the chip they are relinquishing. After all, once the right is gone, it is gone forever. One plaintiff's attorney, Paul H. Tobias, who has written about the problems of at-will employees acknowledged that there is a need for legislation in order to afford the poor, lower-ranked employees access to some form of redress when they are wrongfully terminated.[201] Tobias recommended federal legislation, however, in order to provide uniform protection, recognizing that many employers do business in a number of states.[202] He also suggested a two-tier compromise: employees would be afforded statutory protection in the form of small claims arbitration for most cases; the courts, however, would remain open for larger, more complicated wrongful discharge claims.[203] Such an approach would certainly go far toward remedying some of the cost issues existing under META.[204] Other issues such as coverage, mitigation, and costs of small claims arbitration would, however, remain unresolved.

If META or any other model wrongful termination act is to succeed, it must garner the support of enough self-interest lobbies and pressure groups to shepherd it through the legislative process.[205] So far, some of the strongest support for the Act is coming from organized labor. The United Auto Workers, the American Federation of State, County and Municipal Employees and the California State Federation of Labor have supported this type of legislation for some time.[206] Recently the AFL-CIO added its support.[207] The

---

201. Paul H. Tobias, *Current Trends in Employment Dismissal Law: The Plaintiff's Perspective*, 67 Neb L Rev 178, 190 (1988) ("Tobias").

202. Id.

203. Id at 191.

204. See notes 180-94 and accompanying text.

205. Peck at 751 (cited in note 4), citing Cornelius Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 Minn L Rev 265 (1963).

206. Stanley M. Fisher, *Model Employment Termination Act ("META")*, Speech Before the National Conference of State Legislatures, Labor Issues, 1992: Rebuilding America at 6 (San Diego, Nov 1991) (on file with The *Duquesne Law Review*) ("Fisher").

ACLU also supports the Act, calling META the most important legislation since the National Labor Relations Act.[208] In addition, the Act has received the support of leaders of various arbitration groups including Howard S. Block, the former president of the National Academy of Arbitrators.[209] Not surprisingly, the one group violently opposed to META is the organized plaintiff's bar.[210]

While the opposition of the plaintiff's bar can be explained in terms of self-interest, it can also be explained in terms of client concern. Many of these concerns have been outlined above.[211] Moreover, while the rest of the legal community scoffs at the plaintiff's bar for its self-serving attitude, some of the motives of organized labor and arbitration groups may be equally self-serving. Unions, for instance, stand to gain a statutory right to protection from unjust discharge, thereby eliminating the necessity to bargain for such a right.[212] They also see an opportunity to expand their role, representing workers in wrongful discharge claims outside the confines of collective bargaining agreements.[213] Unions also stand to gain from the elimination of huge jury awards for wrongful discharge claims which make small union awards seem very unsatisfactory.[214] Arbitration groups, likewise, stand to gain enormous business from the enactment of META, which specifically lists the American Arbitration Association as a likely candidate for the day-to-day administration of the Act.[215]

Perhaps the group that stands to gain the most, however, is the employer coalition. As Professor St. Antoine stated:

> One [can] well imagine that eventually an informed employer lobby might conclude that just cause legislation, which would exclude jury verdicts and punitive damages, [is] the preferable solution.[216]

Other scholars agree, believing that judicial decisions will perform a "catalytic function," causing employers to prefer a legislative

---

207. Gould, *Perspective* at 40-41 (cited in note 10), citing AFL-CIO Executive Council, *Statement on the Employment-at-Will Doctrine*, 3 (Bal Harbour, Fla, Feb 20, 1987).

208. Fisher at 7 (cited in note 206).

209. Id, citing Howard S. Block in his address to 500 management and labor representatives on May 30, 1991, in which Block enthusiastically endorsed META.

210. Fisher at 6 (cited in note 206). See also Randall Samborn, *At-Will Doctrine under Fire: Model Act Divides Employment Bar*, 14 Natl Law J 1 (Oct 14, 1991).

211. See notes 101-106 and 200-204 and accompanying text.

212. St. Antoine at 75 (cited in note 56).

213. Gould, *Case* at 417 (cited in note 7) (citation omitted).

214. Id.

215. META at Comment, § 6(a) at 28-29 (cited in note 1).

216. St. Antoine at 69 (cited in note 56).

remedy.[217]

Unfortunately, the only parties without an effective lobby are the at-will employees themselves, who by definition are unorganized. Only the plaintiff's bar can speak for them. Perhaps, therefore, legislators should listen a little more closely to the plaintiff's bar, filtering out the self-interest in order to hear the issues that are of genuine concern to at-will employees. After all, the Commissioners apparently afforded other interest groups this consideration.

One year after its adoption, the future of META still remains uncertain. As one observer noted, ". . . it is impossible to predict how many states will adopt [META]. . ."[218] The same observer also noted, however, that:

> the action of the National Conference of Commissioners on Uniform State Laws in promulgating [META] is, in itself, a harbinger of possible statutory developments on the state level.[219]

Moreover, at least one state Supreme Court justice sees the legislative handwriting on the wall. In a dissenting opinion, Justice Zimmerman of the Utah Supreme Court agreed with the majority of his Court that the discharge of an employee in violation of public policy should be actionable under Utah law, but argued that the action should lie in contract, not in tort.[220] Justice Zimmerman reasoned that using tort law rather than contract law to provide a remedy was akin to using a cleaver rather than a scalpel to remove a brain tumor.[221] He further cautioned the court:

> . . . [W]e should proceed with special delicacy lest we demonstrate that the fashioning of these rules is a task too subtle for our skills and one better performed by others.[222]

Then, in a footnote to this cautionary comment, Justice Zimmerman referred to META as an example of the way in which the court might be replaced by others seemingly better suited to the task.[223]

Professor St. Antoine has likewise predicted that:

---

217. Peck at 752 (cited in note 4).

218. Stephen L. Hayford, Member of the National Academy of Arbitrators, addressing the 45th Annual Meeting of the NAA in Atlanta, GA on May 29, 1992, quoted in 140 LRR 193 d26 (June 15, 1992, BNA, Inc.)

219. Id.

220. *Peterson v Browning*, 832 P2d 1280, 1286 (1992).

221. Id.

222. Id.

223. Id at n 7.

> . . . we shall shortly see on the legal landscape only the decaying husk of the doctrine of employment at will. The far more wholesome theory of just cause will have taken its place.[224]

He is undoubtedly right. It is not as clear, however, that in its present form META contains the seed best suited to produce a healthy crop of the doctrine of just cause.

Jeanne Duquette Gorr

224. St. Antoine at 81 (cited in note 56).